No. 84-1340

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WENDY WYGANT, *et al.*,

Petitioners,

v.

JACKSON BOARD OF EDUCATION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* FOR THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.

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QUESTIONS PRESENTED

(1) Was the denial of petitioners' motion for summary judgment an appealable final order under 28 U.S.C. § 1291?

(2) Did the courts below correctly deny petitioners' motion for summary judgment?

(3) Was petitioners' complaint properly dismissed?

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BRIEF AMICUS CURIAE FOR THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.

INTEREST OF AMICUS

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation established under the laws of the State of New York. It was formed to

assist black persons to secure their constitutional rights by the prosecution of lawsuits. For many years attorneys for the Legal Defense Fund have represented parties in litigation before this Court and the lower courts involving a variety of issues regarding racial discrimination and race conscious affirmative action plans. The parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk.

STATEMENT OF THE CASE

The instant case, unlike previous affirmative action disputes heard by this Court, was never tried on the merits. Shortly after the complaint was filed, the parties filed cross motions for summary judgment; the district court granted respondents' motion and dismissed petitioners' federal claims. (J.A. 5). No

answer has ever been filed in this case, and no discovery was ever taken. Neither party submitted any affidavits or documentary evidence relating to the purpose of the disputed layoff clause, Article XII, or to the events leading to the adoption of Article XII. Nor did those parties adduce materials from which the Court could ascertain how many white and minority teachers might have been laid off in any given year but for Article XII. Thus the record in this case is extremely limited, and is devoid of evidence as to the background of and justifications for the disputed layoff clause, evidence of the sort which several members of the Court regarded as of decisive importance in Fullilove v. Klutznick, 448 U.S. 448 (1980), United Steelworkers of America v. Weber, 443 U.S. 93 (1979), and Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

The question presented by this appeal is whether the instant litigation, unlike Fullilove, Weber and Bakke, should be decided without any trial, and without any determination of the actual purposes, importance or impact of the race conscious plan at issue. The legal issues raised by the cross motions for summary judgment are quite dissimilar, since those two motions must be resolved on the basis of completely different assumptions regarding the as yet unlitigated factual issues. Yet a third set of issues are raised by respondents' motion, under Rule 12(b)(6), to dismiss the complaint for failure to state a claim on which relief could be granted.

SUMMARY OF ARGUMENT

Although this case was decided on cross motions for summary judgment, almost all of the potentially important facts

remain hotly contested. Both parties assert that there are no material issues of fact in dispute, but petitioners and respondents offer radically different accounts of what the purportedly undisputed facts are. Respondents insist the school board had a history of intentional racial discrimination which the challenged layoff clause, Article XII, was adopted to redress; petitioners deny the existence of any such history or remedial purpose. Respondents assert that the retention of a substantial number of minority teachers under Article XII was essential to the effective education of both minority and white students; petitioners insist Article XII had the effect of impairing the education of those students. Respondents contend that, in the absence of Article XII, layoffs would have drastically reduced the number of minority teachers in Jackson; petitioners claim the absence of

Article XII would have had little effect on the proportion of minority teachers.

This appeal does not present a record on which any of these or other disputed issues of fact can be resolved; indeed, it presents virtually no record at all. Neither party sought to offer in the district court any affidavits, documents, or other evidentiary material throwing any light on the purposes of or need for Article XII. Accordingly, the issue posed by this case in its present posture is whether the constitutionality of Article XII can be decided without any need for a trial, and without resolving any of the obvious disputes of fact regarding the purposes and impact of that disputed layoff provision.

The action of the district court in denying petitioners' motion for summary judgment is not an appealable final order. United States v. Florian, 312 U.S. 656

(1941). This Court therefore lacks jurisdiction to decide whether the denial of petitioners' motion was correct.

Petitioners, in urging that their motion for summary judgment should have been granted, rely largely on assertions of their view of the disputed facts. The Solicitor General argues that the Fourteenth Amendment requires that any race conscious affirmative action plan must (1) include an advance individualized factual determination that each beneficiary was the victim of past discrimination, and (2) provide for individualized adjustment of level of benefit for each beneficiary, based on the particular type and amount of discrimination to which that beneficiary was subject. On this view, Article XII, and virtually all federal, state, and local race conscious programs would be unconstitutional, regardless of the purpose for which they may have been

adopted, or the compelling state interest which they might serve.

This Court, however, has repeatedly approved voluntary programs adopted to redress past discrimination which contain no such individualized treatment of beneficiaries. Califano v. Webster, 430 U.S. 313 (1977); Schlesinger v. Ballard, 419 U.S. 498 (1975). Government agencies have traditionally been accorded wider latitude in correcting problems of past discrimination than might be appropriate in a judicial decree. Even in framing such decrees, the courts are not required to use the surgical precision demanded by the Solicitor; in school cases, for example, there is no requirement that the courts attempt the impossible task of predicting precisely which school each affected student would have attended but for past discrimination.

The complaint does not state a claim on which relief can be granted. The complaint itself expressly alleges that Article XII was adopted for a legitimate, non-invidious purpose -- the redressing of past discrimination. The legislative history of the Fourteenth Amendment makes clear that race conscious actions taken for such a purpose do not violate the Equal Protection clause.

ARGUMENT

I.

THE DISTRICT COURT'S DENIAL OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT IS NOT AN APPEALABLE ORDER

The action of the district court, insofar as it denied petitioners' motion for summary judgment, is not a final appealable order. United States v. Florian, 312 U.S. 656 (1941), rev'g 114 F.2d 990 (7th Cir. 1940). An order

denying summary judgment is not a final adjudication of the movant's claims, but merely defers that adjudication until after trial. Wright and Miller, Federal Practice and Procedure § 2715. For that reason the courts of appeals have consistently held that the appellate courts lack jurisdiction to review a denial of summary judgment.[1]

Petitioners' original motion contained a four word pro forma prayer for "injuctive relief"; had a request for an injunction been seriously and consistently pursued, jurisdiction on appeal would exist under 28 U.S.C. § 1292(a)(1). But petitioners did not do so. Petitioners' motion neither alleged the irreparable injury that is a prerequisite to any

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[1] See, e.g., Matthews v. IMC Mint Corp., 542 F.2d 544 (10th Cir. 1976); Hart v. Overseas Nat. Airways, Inc., 541 F.2d 386 (3d Cir. 1976); Gialde v. Time, Inc., 480 F.2d 1295 (8th Cir. 1973).

injunction, nor specified what injunctive relief they were seeking. The request for relief in petitioners' district court brief made no mention of any injunction, and petitioners did not raise the issue at oral argument in that court. The district court clearly did not understand there to be a pending request for any injunction; the court's opinion refers to no such request, and the judgment does not purport to deny any motion for an injunction. Petitioner's brief in the court of appeals neither referred to any earlier request for injunctive relief nor asked the appellate court, if it reversed, to award such relief. In this Court neither the Petition for Writ of Certiorari nor the Brief for Petitioners contain any reference to a past or present request for an injunction, and the only relief requested in petitioners' brief is limited to damages, costs, and attorneys fees. Thus

the rejection of petitioners' motion for summary judgment cannot be deemed a denial of injunctive relief, and any claim to the contrary has long ago been abandoned.

Under these circumstances, the only issue over which this Court has jurisdiction is whether the lower courts erred in dismissing petitioners' complaint, since only that dismissal, but not the rejection of petitioners' motion for summary judgment, was an appealable final order. If this Court concludes that that dismissal was erroneous, such a holding would resolve the only appealable issue in this case, and the case would have to be remanded for trial. This Court lacks jurisdiction to proceed further and decide whether petitioners' own motion for summary judgment should have been granted. Thus the sole question which is technically before this Court is not whether

Article XII is constitutional, but only whether petitioners are entitled to a trial regarding its constitutionality.

For this reason the Court is without jurisdiction to decide whether petitioners' motion for summary judgment was properly denied. We nonetheless set forth below our views on that issue.

II.

THE DISTRICT COURT PROPERLY DENIED PETITIONERS' MOTION FOR SUMMARY JUDGMENT

Petitioners would have been entitled to summary judgment at this early stage in the litigation only if the district court could have determined that "there is no genuine issue as to any material fact" and that petitioners were "entitled to a judgment as a matter of law." Rule 56(c), Federal Rules of Civil Procedure. In acting on such a motion any doubt as to

the existence of a genuine issue of material fact must be resolved against petitioners as the moving party. Adickes v. S. H. Kress & Co., 398 U.S. 144, 157-59 (1970).

(1) The Contentions of Petitioners

Petitioners contend, first, that the actual purpose of Article XII "is to achieve 'parity' between the constantly changing percentages of minority students and faculty." (P. Br. 22; see also id. at 10, 17-18). Petitioners can point to nothing in the record, however, suggesting that there is no "genuine issue" as to the truth of this claim; indeed, there is nothing in the record which even suggests such a purpose. Petitioners' own Complaint alleged purposes underlying Article XII which had nothing to do with "achieving 'parity'". (Complaint, ¶¶ 20, 32, 33).

Petitioners assert, in the alternative, that Article XII was not adopted to correct past acts of discrimination by the respondent school board. (P. Br. 7, 10, 30, 40). Again, however, since the record is silent as to the purpose of Article XII, the Court cannot assume that remedying such discrimination was not among the goals of that provision. Indeed, in the district court respondents expressly asserted that Article XII was adopted at least in part to "provide an effective remedy for past discrimination."[2]

Even if there was such a remedial purpose, petitioners object, it was unsupportable, since "the record below does not and cannot support any ... finding" of past discrimination. (P. Br.

[2] Defendants' Brief in Support of Its Motion for Summary Judgment, p. 15; see also id. at 5 ("the new layoff policy was partially designed to correct past discriminatory policies").

12; see also id. at 11, 35). If this case had come to this Court following a trial on the merits, the sufficiency of the record to support material contested factual findings might be of importance. But on a motion for summary judgment the burden was on the moving party, here petitioners, to demonstrate the absence of a genuine issue of fact regarding past discrimination. Petitioners, however, did not do so; respondents, far from agreeing that the board had never discriminated against blacks in the past, asserted precisely the opposite and insisted that they could prove at trial that such discrimination had occurred.[3]

Petitioners alleged in their complaint that Article XII was adopted, at least in part, because respondents believed that the presence of a substan-

[3] Defendants' Brief in Support of Its Motion for Summary Judgment, p. 35.

tial number of minority teachers was essential to providing students, particularly minority students, with an effective education. (Complaint, ¶ 32). In their briefs in this Court petitioners further contend that, as a matter of fact, neither Article XII nor the presence of minority teachers was required for the achieving that admittedly essential goal. Petitioners assert, for example, that the particular black school children attending the Jackson schools have in fact been unscarred by the nation's heritage of discrimination, are in no need of black role models on the school's staff, and would in no way suffer if there did not happen to be any black teachers at those schools. (P. Br. 37-39). As before, these factual contentions, if sustained at trial, might provide some support for petitioners' claims, but on a motion for

summary judgment the Court is required to assume that the facts are otherwise. Similarly, petitioners' objection that respondents "did not offer a shred of evidence in the courts below to support this rationale" (P. Br. 37), is simply beside the point; on a motion for summary judgment the opposing party is under no obligation to adduce evidence on any issue until and unless the moving party has done so.

Petitioners argue that, had Article XII not been in effect during the 1981-82 school year, the layoffs implemented in that year would have reduced the proportion of minority teachers only to 11%. (P. Br. 31 and n. 27). At the summary judgment hearing, however, respondents asserted precisely the opposite, contending that the impact of Article XII was far more substantial, and that without it the school system "would have ended up with

almost no minority teachers at all."[4] This factual dispute also cannot be resolved on the present record; under the collective bargaining agreement layoffs are made, not on the basis of district wide seniority, but on the basis of seniority among the teachers holding a specific position at a particular school. (J.A. 23-28). Thus a music teacher at one school might be laid off even though he or she had more seniority than a physics teacher at that school, or even a music teacher at another school. It is therefore impossible to reconstruct the impact of any particular layoff without knowing the nature and school of the positions eliminated, and the race and school of every other teacher in the system with that particular

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[4] Transcript of hearing of February 23, 1982, p. 21; see also id. at 20 ("Absent that language, we wouldn't have any minority teachers....").

specialty. None of that information is in the record.

B. The Arguments of the Department of Justice

(1) The complaint in this action alleged that one of the purposes of Article XII was to assure the retention in the Jackson school system of a substantial number of minority teachers whose presence was thought to be essential to the effective education of minority students. (Complaint, ¶ 32). The Justice Department contends that such a purpose could not sustain a race conscious measure such as Article XII, offering in support of this contention an essentially factual argument.

It is important to note at the outset the limited nature of the Justice Department's contentions. First, the Department does not suggest that the education of

public school students is inherently so unimportant that it could not provide a basis for a race conscious plan. On the contrary, the Solicitor General apparently acknowledges that providing for the effective education for all students, particularly those affected by past patterns of discrimination, is a matter of compelling importance. Education remains, as it was at the time of Brown v. Board of Education, "perhaps the most important function of state and local governments," and the impact of societal discrimination on minority students "may affect their hearts and minds in a way unlikely ever to be undone." 347 U.S. 483, 493-94 (1954). Second, the Department does not question the bona fides of the school officials and teachers' union that adopted Article XII; on the Solicitor's view those who approved that provision acted out of genuine,

albeit misguided, concern for the interests of the school children of the city of Jackson. Third, the Justice Department does not offer any general objection to the educational expertise of either the administrators or teachers in the Jackson school system. On all other matters of curriculum and staffing the Solicitor General would not presume to second guess the judgment of local officials who ordinarily bear the responsibility for assessing and meeting the educational needs of Jackson school children.

In this instance, however, it is the view of the Solicitor General that those administrators and teachers, despite their general expertise and familiarity with local circumstances, and although acting in the best of faith, have misapprehended the educational needs of Jackson school children. Local authorities may believe

that minority students in Jackson may learn more if some of their teachers are minorities,[5] but the Solicitor General asserts that they are mistaken, and objects that "no evidence for such an empirical effect was ever suggested, let alone examined and subjected to criticism and refutation" (U.S. Br. 5) (emphasis added). At the present stage of this proceeding, however, no "evidence" from respondents was called for, since petitioners adduced no affidavits or other material bearing on this factual issue.

The Solicitor also contends that, although minority teachers may well provide invaluable role models for minority students, the retention of such teachers under Article XII actually

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5 In a school system, such as Jackson, with approximately 15% minority teachers, a minority student is likely to have at most only a single minority teacher during his or her critical elementary school years.

impairs the education of minority students because Article XII operates as an object lesson in the evils of affirmative action (U.S. Br. 23). Again however, no evidentiary material was offered in the district court to compel or support this contention that Article XII has in fact adversely affected the education of minority students. For his conclusions regarding the effect of Article XII, the Solicitor relies, not on any evidence in the record regarding its impact on present and former Jackson school children, but on a 1972 book by a California economist and a 1974 article by an Illinois law professor. (U.S. Br. 23 and n.39.) Neither of these materials contains any reference to Jackson or Article XII; they offer, rather, merely general assertions about the effect of "all racial preferences" on all blacks and are based, not on any empirical evidence, but only on the

authors' philosophical views about what such preferences "are really saying." (Id.) Such materials are clearly insufficient to support a holding that there is no genuine issue of fact as to the correctness of the Solicitor's pedagogical theories.

The Solicitor General also argues that the benefits that flow from the presence of minority teachers can be achieved in other ways. It simply would not matter if layoffs eliminated all the black teachers in a school or throughout the system, he asserts; the remaining all-white faculty, the Solicitor argues, could simply offer courses on black history and encourage successful minority adults from other walks of life to visit the Jackson schools to show Jackson students the opportunities that exist elsewhere. The Solicitor General thinks it a relatively simple matter for a white

teacher to understand what it is like to grow up black in the United States, and to act in such a manner that black students will relate to him or her in the same manner that they would relate to a black teacher. The Solicitor's pedagogical theory, however, was never advanced by petitioners in the district court, and certainly does not constitute an uncontested fact upon which summary judgment could be based.

(2) The complaint in this action also alleged that Article XII was adopted to correct or compensate for societal discrimination. The Justice Department accepts this as a legitimate governmental goal, and agrees that race conscious measures can at times be used to achieve that end. But the Department argues that there is only one form of constitutionally acceptable race conscious action, a model which requires a highly individualized

assessment of the extent to which each potential minority beneficiary has suffered from discrimination in the past. We agree that the Justice Department's plan would be constitutional, but contend that this is not the only form of race conscious action permitted by the Constitution.

In order to assess the government's contention, it is essential to recognize what the Justice Department is not arguing. First, the Department does not assert that the Fourteenth Amendment forbids a state or locality from taking race conscious action to redress discrimination by third parties. In Bakke, Justice Powell asserted that the states have "a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination," 438 U.S. at 307, and the Solicitor General does not

argue otherwise. Thus, Jackson could certainly provide special educational assistance to minority students who moved to that city from school districts where they were the victims of discrimination in education. See Milliken v. Bradley, 433 U.S. 267 (1973). Similarly, the respondent board could provide special employment benefits for teachers who had suffered the effects of earlier discrimination in education or employment. State officials since the days of the underground railroad have been providing aid and redress for the victims of discrimination by others, and it is inconceivable that the framers of the Fourteenth Amendment intended to forbid such practices.

Second, the Solicitor General does not suggest that the injuries which a state or locality may undertake to redress are limited to those harms which flow

immediately and directly from acts of discrimination. The Solicitor recognizes, for example, that systematic discrimination against black adults may discourage or demoralize children, and that that indirect but very real impact is one which a state can and should attempt to undo. The experience of this Court and the lower courts has repeatedly demonstrated that as a practical matter the secondary and indirect effects of racial discrimination may often cause severe and enduring injuries. Rogers v. Paul, 382 U.S. 98, 200 (1965) (effect on students of faculty segregation); Gladstone Realtors v. Bellwood, 441 U.S. 91 (1979) (effect on whites of housing discrimination against blacks).

But while the states are free to engage in race conscious action to aid the victims, direct or indirect, of its own or third party discrimination, the Solicitor

insists that such assistance may take one and only one form. Some sort of individualized consideration must be given, the Solicitor urges, to each individual who is the intended beneficiary of an affirmative action plan, to assure that he or she was in fact the victim of past discrimination, and to calculate the appropriate amount of voluntary redress possible. Once that analysis is completed, all victims of past discrimination must be treated alike. Article XII deviates from the Justice Department plan, and in the Department's view is thus defective, in three respects: first, it does not guarantee that every minority beneficiary is a victim of past third party discrimination; second, the benefits afforded to any individual by Article XII are not based on the extent of his or her particular past injuries; and third, Article XII protects only some but not all minority teachers who were the

victims of past discrimination. The Justice Department does not urge that utilization of its proposed approach would have prevented the laying off of the white teachers who are the petitioners in this case. Indeed, it is of course quite possible that under the Justice Department plan even more minority teachers would have been protected, and even more white teachers laid off.

The Justice Department's argument is insufficent for several reasons to justify the granting of summary judgment. First, this case, like the attack on the minority set-aside provision in Fullilove v. Klutznick, 448 U.S. 448 (1980), is only a facial constitutional challenge to Article XII; the petitioners do not allege that the minority beneficiaries of Article XII were not the victims of past societal discrimination, but argue that Article XII is unconstitutional regardless of the

background of the minority teachers who were benefitted by it. But if the benefits of Article XII in fact fell upon a constitutionally appropriate group of minority teachers, the failure of respondents to use the approach preferred by the United States neither affected the outcome of the disputed layoffs nor caused petitioners any injury in fact., Warth v. Seldin, 422 U.S. 490 (1975).

The primary argument advanced by the Justice Department in support of its proposed prototype of affirmative action is that this proposal resembles the type of relief which a court might provide for past discrimination on the part of the respondent school board. But this Court has repeatedly held that government authorities are free to take voluntary race conscious action that exceeded the relief which a court might order in an adversarial proceeding. Swann v.

Charlotte-Mecklenburg School District, 402 U.S. 1, 16 (1971). The minority set-aside program upheld in Fullilove v. Klutznick far exceeded in scope and type any remedy that a court might have ordered to redress past discrimination against minority contractors.

These differing approaches to court ordered and voluntary race conscious plans reflect critical distinctions between the judicial process on the one hand and the legislative and political processes on the other. Courts are particularly well equipped to examine in detail the specific circumstances of limited numbers of individual claimants, but can often look only to tradition precepts of law or equity to strike the proper balance between the interests of whites and minorities. Elected officials, on the other hand, frequently must take actions affecting such large numbers of indivi-

duals that consideration of individual claims and cases is simply impossible; executive and legislative officials often must govern by classification if they are to govern at all. Thus while the United States in this case insists that the slight degree of overinclusion or underinclusion would be intolerable, this Court has repeatedly rejected similar attacks on the over and underinclusiveness of federal and state laws, insisting that the sort of surgical precision here demanded by the Justice Department is often impossible to achieve. In both Schlesinger v. Ballard, 419 U.S. 498 (1975) and Califano v. Webster, 430 U.S. 313 (1977), this Court upheld, at the behest of the Solicitor General, statutes which provided, in order to redress past discrimination, compensatory treatment for all women; neither of those statutes required or permitted any individualized inquiry into whether

particular beneficiaries had in fact been the victims of such past discrimination.

Moreover it is incorrect to suggest that race conscious judicial decrees are or should be framed to benefit only identifiable victims of past discrimination. The lower courts have frequently found it necessary to issue such decrees in order to prevent future discrimination. Thus in cases where district judges have concluded that an employer would not obey a general injunction against employment discrimination, quota hiring or promotion orders have been required simply to end continued intentional violations of the law.[6] Race conscious orders regarding the selection of supervisory personnel[7] or

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[6] See, e.g. NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974); Morrow v. Crisler, 491 F.2d 1053 (5th Cir. 1974).

[7] See, e.g. McKenzie v. Sawyer, 684 F.2d 62 (D.C. Cir. 1982) (3 of 5 members of selection panel to be black); cf. Taylor v. Jones, 653 F.2d 1193 (8th Cir. 1981) (quota hiring necessary to end racist

public employees[8] have been utilized where district courts regarded them as necessary to prevent discrimination against subordinate workers or against the public. Where an employer has been found guilty of using a non-job related employment test, and no new test has yet been framed, courts have directed that, as an interim measure, the old test may be utilized in combination with a race-conscious adjustment to eliminate the discriminatory effect of that test.[9] Even in providing

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environment of virtually all white workforce).

8 See, e.g., Williams v. Vukovich, 720 F.2d 909 (6th Cir. 1983) (police); NAACP v. Beecher, 679 F.2d 965 (1st Cir. 1982) (police and fire); Morgan v. Kerrigan, 530 F.2d 431 (1st Cir. 1976) (teachers).

9 See, e.g. Berkman v. City of New York, 705 F.2d 584 (2d Cir. 1983) (interim quota hiring order necessary as "compliance relief"); Kirkland v. New York Dept. of Corrections, 628 F.2d 796 (2d Cir. 1980) (interim order adding 250 points to scores of minority applicants on non-job related test).

relief for victims of past discrimination, judges have at times found it impracticable to frame decrees affecting thousands of potential victims of classwide discrimination with the same precision that might be possible in a single tort action.[10] School desegregation orders, for example, have never attempted to identify which student would have been in which school but for the proven de jure segregation. In framing remedial decrees, federal courts act in a complex world in which it is at times impossible to precisely reconstruct the past, and must settle for doing rough justice if they are to do justice at all.

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10 Segar v. Smith, 738 F.2d 1249, 1289 n.36 (D.C. Cir. 1984) (individualized hearings not required where impracticable); Association Against Discrimination v. City of Bridgeport, 20 FEP Cases 985 (D.Conn. 1979) (where number but not identities of victim known, beneficiaries of decree to be chosen by lot among probable victims).

(3) The Solicitor urges, finally, that even if the purposes underlying Article XII are constitutionally sufficient, Article XII must nonetheless be declared unconstitutional because the agency that approved it, here a local school board, lacked the "constitutional competence" to make whatever findings or policy decisions might be required. (U.S. Br. 29.) The Solicitor does not dispute the board's practical competence to make the necessary judgments -- no state agency could be better equipped to assess the educational needs of Jackson school children, or the steps necessary to redress any past constitutional violations that may have been caused by Jackson officials, than the Jackson school board itself. Nor does the Solicitor deny that Michigan law confers the requisite authority on the board. The Solicitor asks this Court to declare Michigan law

unconstitutional insofar as it confers authority on a mere school board the power to take the same race conscious action that would be permissible if taken by some other agency.

The proposal here advanced by the Department of Justice would forbid a state agency that was in violation of the United States Constitution to take action to end that violation if only race conscious action would suffice. On this view, a school board which had initially assigned students on the basis of race could not deliberately reassign them on that basis to schools with integrated student bodies and faculties, even though such reassignments are at times constitutionally required. Swann v. Charlotte-Mecklenberg School District, 402 U.S. 1 (1971). The only constitutionally permissible course for such a school board, the Solicitor suggests, would be to continue to operate

its segregated schools, possibly subject to a freedom of choice plan, until a federal court was persuaded to intervene to direct an end to that constitutional violation. The doctrine which the Solicitor General urges be read into the Fourteenth Amendment is not a new one; it was enthusiastically embraced by school officials for two decades after Brown and bore the name "massive resistance." What was once widely condemned as recalcitrant disobedience to the decisions of this Court, the Justice Department now urges, should have been lauded as a prescient act of constitutional responsibility.

The Solicitor also proposes that agencies such as the respondent school board, which enjoy wide ranging authority under state law to redress any injuries inflicted by others on the citizens with whom it deals, should be stripped of that authority in one instance only, that

involving injuries occasioned by past racial discrimination. But this sort of selective obstruction of voluntary government action beneficial to blacks was precisely the constitutional vice condemned by this Court in Hunter v. Erickson, 393 U.S. 385 (1969). Were the state of Michigan to adopt a statute embodying the principles now advanced by the Solicitor, such a law would clearly be unconstitutional under Hunter.

Nothing in existing constitutional jurisprudence provides any guidelines for determining "constitutional competence;" the Solicitor General appears to assert that only Congress is "constitutionally competent" to take race conscious action (U.S. Br. 29-30), while Justice Powell indicated in Bakke that some state agencies would also be "constitutionally competent" to do so. 438 U.S. at 309. This disagreement is only a small indica-

tion of the enormous difficulties which this Court and the lower courts would face in assessing the "constitutional competence" of the thousands of different state and local agencies that have adopted an enormous variety of race conscious affirmative measures. This Court has in the past scrupulously refrained from restricting the authority of the states to allocate their authority among subordinate agencies and localities. Holt Civil Club v. Tuscaloosa, 439 U.S. 60 (1978). A similar degree of restraint is called for here.

II.

THE DISTRICT COURT PROPERLY DISMISSED PETITIONERS' COMPLAINT

The district court characterized its decision in this action as one upholding respondents' motion for summary judgment.

In light of the factual disputes noted above, we do not contend that summary judgment should have been granted to either party. Respondents also moved to dismiss the complaint for failure to state a claim on which relief could be granted. Rule 12(b)(6), Fed R. Civ. P. We urge that the allegations of the complaint are insufficient to state a violation of the Fourteenth Amendment.

If the complaint had alleged that Article XII was adopted in order to stigmatize white teachers, or out of an invidious racial hostility to the interests of whites, it would certainly have stated a cause of action. But petitioners' complaint made quite specific allegations concerning the origin of Article XII, asserting that that provision was adopted for the benign purposes of redressing past societal discrimination and providing a more effective education

for minority students. These purposes, of course, are entirely legitimate, and any non-race conscious provision adopted for such purposes would certainly have been unconstitutional. The question raised by respondents' motion to dismiss is whether petitioners would be entitled to relief if they were to prove that such motives underlay Article XII.

We agree with the United States that this issue should be answered, if possible, by reference to the original intent of the framers of the Fourteenth Amendment. (U.S. Br. 11-16). Every member of this Court has expressed a preference for resolving constitutional issues on the basis of the original intended meaning of the constitutional provision at issue. Had Article XII provided special layoff proection for handicapped or female teachers for the purpose of redressing past discrimination or providing role

models for disabled or female students, it would certainly have been constitutional. Mississippi University for Women v. Hogan, 458 U.S. 718 (1982); City of Cleburn v. Cleburn Living Center, Inc., 52 U.S.L.W. 5022 (1985). We urge that the Fourteenth Amendment was not adopted in order to prevent the states from taking the same sort of remedial action for blacks that is clearly permitted on behalf of less disadvantaged groups.

The views of affirmative action held by the framers of the Fourteenth Amendment have been set forth at length elsewhere,[11] and we summarize them here only briefly. Section 1 of the Fourteenth Amendment was adopted to prohibit, inter alia, what

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[11] "Affirmative Action and the Legislative History of the Fourteenth Amendment," 71 Va. L. Rev. ____ (June 1985); Brief of NAACP Legal Defense and Educational Fund, Inc., as Amicus Curiae, Regents of the University of California v. Bakke, No. 76-811, pp. 10-53.

proponents described as "class legislation,"[12] the phrase used in the nineteenth century to refer to what we would today describe as intentional discrimination. The debates on Section 1 itself were fairly perfunctory, but an extremely detailed and vigorous debate regarding the meaning of "class legislation" occurred during the same Congress that framed the Fourteenth Amendment. The substance of those debates, and of the legislation ultimately approved, provide unambiguous evidence the Congress did not regard race conscious remedial action as "class legislation" prohibited by Section 1.

During the era when the Fourteenth Amendment was being framed and ratified, Congress approved seven statutes creating special preferences or programs for blacks alone. The most important of these was

[12] Cong. Globe, 39th Cong., 1st Sess., 2766 (Rep. Stevens).

the 1866 Freedmen's Bureau Act,[13] which expanded the scope of an 1865 law establishing the Bureau.[14] The 1866 Act contained five provisions expressly limited to blacks. Section 12 authorized the Bureau to establish schools throughout the south for the education of freedmen, and section 13 authorized the Bureau to provide other assistance to private associations engaged in the education of freedmen. Sections 6, 7 and 9 conferred on blacks title to certain land on which they had been settled by Union military officials. Section 1 of the 1866 Act authorized the continuation of activities authorized by the 1865 Act, which included providing "provisions, clothing, and fuel" for "destitute and suffering refugees and freedmen,"[15] and the regulation of "all

[13] 14 Stat. 173.
[14] 13 Stat. 507.
[15] 13 Stat. 507-08.

subjects relating to refugees or freedmen."[16] This language was on its face racially restrictive, since whites were covered only if they were refugees, whereas all southern blacks were included. Equally importantly, both supporters,[17] and opponents[18] of the 1866 Act correctly agreed that most of these existing programs had been and would continue to be open only to blacks.[19]

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16 13 Stat. 507.

17 Representative Eliot, the House sponsor, for example, referred only to freedmen in describing the 1866 Act. Cong. Globe, 39th Cong., 1st Sess., 514-15 (1866).

18 Id. at 544 (remarks of Rep. Ritter) (there were no white refugees), 634-35 (remarks of Rep. Ritter), App. 78 (remarks of Rep. Chanler) (bureau gives "most of its aid exclusively to the negro freedmen"); App. 83 (remarks of Rep. Chanler) (freedmen not refugees received "the special care of the bureau").

19 The general exclusion of whites is apparent from the Bureau's first report to Congress. House Exec. Doc. 11, 39th Cong., 1st Sess. (1865). Among the programs where only freedmen were among the named or intended beneficiaries were education (id. 2, 3, 12, 13), regulation

In addition to these provisions, in February, 1863, Congress chartered and authorized a grant of land to an association to aid "destitute colored women and children,"[20] no comparable provision being made for poor whites. In March of that year Congress chartered another organization "to educate and improve the moral and intellectural condition of such of the colored youth of the nation as may be placed in its care."[21] In March 1865 Congress established a bank whose depositors were to be limited to former slaves "or their descendants."[22] In 1866, Congress also adopted special legislation,

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of labor (id. 2, 12), land distribution (id. 4, 7-12), resolution of civil disputes (id. 22), and aid to orphans (id. 23). Of 28,057 individuals receiving medical assistance, only 238 were refugees. Id. 20-21.

20 12 Stat. 650.

21 12 Stat. 796.

22 13 Stat. 514.

applicable only to black soldiers and veterans, establishing a ceiling on the fees that could be charged by agents or attorneys handling claims of those servicemen for certain enlistment bonuses.[23] When that legislation apparently proved inadequate, Congress enacted a second measure providing that all bonuses owed certain black servicemen were to be paid to the commissioner of the Freedmen's Bureau, who would in turn disburse the appropriate amount to each serviceman and his agent or attorney, if any.[24] Also in 1867 Congress approved a special appropriation "for the relief of freedmen or destitute colored people in the District of Columbia."[25]

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[23] 14 Stat. 368.

[24] 15 Stat. 26-27.

[25] 15 Stat. 20.

These race conscious measures were consistently opposed as a form of racial discrimination against whites. Numerous members of Congress condemned this legislation in terms essentially identical to those of Justices Stewart and Rehnquist in their dissent in Fullilove, 448 U.S. at 522-26, insisting that race conscious action was intolerable regardless of the race of the beneficiaries or the motives of the responsible government officials. These measures were expressly attacked both by President Johnson[26] and on the floor of the House[27] and Senate[28] as "class legislation". Proponents of these bills insisted, on the other hand, that they were necessary and proper to "ameliorate

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[26] Messages and Papers of the President, viii, p. 3633 (1914).

[27] Cong. Globe, 39th Cong., 1st Sess., 2780 (Rep. LeBlonde) (1866).

[28] Cong. Globe, 40th Cong., 1st Sess., p. 79 (1867) (remarks of Sen. Grimes).

the condition" of blacks, and insisted that such benign considerations of race were necessary "to breakdown the discrimination between whites and blacks."[29]

Critics of these seven enactments voiced arguments quite similar to the theories advanced by the Solicitor General in this case. Four Senators[30] and two Representatives[31] objected that these measures were underinclusive, and unjustifiably failed to provide similar assistance for various groups of equally disadvantaged whites. Senator Howe, on the other hand, complained that the 1867 statute assisting black servicemen was overinclusive, since it did not "discriminate at all between ... those who are

[29] Cong. Globe, 39th Cong., 1st Sess., 631-32 (remarks of Rep. Moulton).

[30] Id. 297, 319, 370, 371.

[31] Cong. Globe, 38th Cong., 1st Sess., App. p. 54; Cong. Globe, 39th Cong., 1st Sess., 629.

educated and those who are not."[32] Similarly, an unsuccessful effort was made to limit the coverage of the 1865 Freedman's Bureau Act to newly freed slaves,[33] so that it would not extend to men and women who had been emancipated decades earlier, or as infants, and had long overcome any effects of that earlier status.

It is thus apparent that there were in 1866 a substantial number of Representatives and Senators who shared the Solicitor's preference for surgically precise remedial measures, or who agreed with Justice Rehnquist's view that benign considerations of race are as obnoxious as invidious considerations. But every one of these 19th century critics of affirmative action voted against approval of the

[32] Cong. Globe, 40th Cong., 1st Sess., 81.

[33] See Cong. Globe, 38th Cong., 1st Sess. 2798, 2800-01, 2971, 2973.

Fourteenth Amendment.[34] The sponsors of the Amendment, Congressman Stevens and Senator Wade, as well as its reported author, Congressman Bingham, all voted for the Freedmen's Bureau Act. The sponsors of the Act, Senator Trumbull and Congressman Eliot, voted for the Amendment; Eliot spoke at length in support of the Amendment, and Trumbull both wrote and sponsored the 1866 Civil Rights Act whose substantive provisions were the basis of section 1 of the Fourteenth Amendment. The thirty-ninth Congress, which was fully aware of the racial preferences contained in the Freedmen's Bureau Act finally approved in July, 1866, cannot conceivably have intended the constitutional amendment adopted in June, 1866, to condemn precisely such preferences. On the contrary, the supporters of the Act and the Amend-

[34] Cong. Globe, 39th Cong., 1st Sess., 3042, 3149, 3842, 3850.

ment regarded them as both consistent and complementary. No member of Congress ever intimated that he saw the least inconsistency between the racial preferences being adopted by Congress and the Equal Protection Clause of the Fourteenth Amendment.

It is thus clear that the Congress which framed the Fourteenth Amendment regarded as praiseworthy, not unfairly discriminatory, race conscious government action taken for the purpose of ameliorating the effects of past discrimination. Since petitioners' complaint asserts that it was that very purpose which was the reason for Article XII, the complaint itself alleges the existence of a constitutionally sufficient justification for Article XII. Thus, the facts alleged in the complaint, if taken as true, would not state a claim upon which relief could be granted.

The Justice Department, however, asserts that while this alleged purpose of Article XII is constitutional, such a race conscious action must be "precisely tailored" to redress the individually assessed injuries of particular victims of discrimination. But the legislative history of the Fourteenth Amendment reveals no such concern with precision. It is obvious, moreover, that 19th century race conscious measures discussed above, which the Solicitor General concedes would be consitutional if adopted by a state, could not meet any of the stringent standards that the Solicitor General now advocates. First, the Solicitor asserts that under any race conscious plan "the benefit conferred" must be "measured by the nature and extent of the prior violation" (U.S. Br. 26). But the nineteenth century race conscious measures provided the identical benefit to all

black beneficiaries, regardless of the extent to which they were victims of past discrimination. Second, the Solicitor asserts that any race conscious plan would be "fatally under inclusive" if the groups singled out for preferential treatment are "not the only groups that have been discriminated against in the country." (U.S. Br., 29). But the nineteenth century measures could not meet this test either, for they provided no benefits at all for Mexican-Americans, Chinese immigrants, Indians, or women, all of whom were subject in this era to forms of discrimination far more virulent than exist today. Third, the Solicitor asserts that in each instance the benefit conferred must "correspond to [an] identified prior wrong." (U.S. Br. 26). But the nineteenth century statutes neither identify a specific prior wrong to which they are addressed, nor contemplate

individualized consideration of the specific wrongs previously visited upon particular beneficiaries. The types of wrongs worked by slavery, for example, varied widely; some slaves were physically abused and denied any marketable skills, while others were immune from such abuse and were taught a trade. Yet all former slaves were afforded the same medical care and educational opportunities under the Freedmen's Bureau Act regardless of their particular background.

The Solicitor argues, finally, that any race conscious measure must include an individualized assessment of whether each proposed beneficiary had been the victim of past discrimination. "[I]t constitutes far too gross an over-simplification to assume that every Negro ... suffers the effects of past or present discrimination" (U.S. Br. 26-27) (emphasis added). But the Solicitor himself characterizes the

rationale underlying the race conscious measures adopted after the Civil War in terms of precisely such an assumption. "It seems safe to assume that virtually everyone aided by these enactments was a direct victim of slavery or racial oppression." (U.S. Br. 16 n.24) (Emphasis added). The thirty-ninth Congress did not contemplate individualized fact finding regarding the history of each beneficiary of its legislation, but resorted, as did respondents in the instant case, to administrable classification that it regarded as likely to reasonably encompass the intended beneficiaries.

Had Article XII been adopted by Congress in 1866, it certainly would have been constitutional. Article XII is no less tailored than the enactments which Congress did approve, and the special benefit accorded by Article XII is quite modest in comparison to those provided by

Congress a century ago. The subsequent passage of time does compel a different conclusion here. There are, of course, those who now believe that a century of de jure segregation has had few lasting effects, just as in 1866 there were men still prepared to argue that slavery had not injured blacks at all. But there are also today large numbers of responsible public officials who believe that virtually every black in the nation was a direct or indirect victim of racial oppression.

That is not, we submit, a controversy which the courts are in any way equipped to resolve. No rule of law provides a standard for analyzing the conflicting social and economic data. Legal research cannot trace the effects of past events on the lives of tens of millions of non-white Americans. The necessary understanding of the imponderables of human nature cannot be gleaned from the reading of any record

on file with this Court. The resolution of the dispute between the Jackson Board of Education and those who object to Article XII must be left to the electoral and collective bargaining process.

Every party to this litigation looks forward to a time when racial discrimination, like the abuses of George III, will be an historical curiosity about which our children will learn only in history classes. But from the halls of Congress to the offices of the Jackson school board, public officials all across the nation believe that that happy day is far from at hand, and that measures such as Article XII remain essential; it is not for this Court to say otherwise.

CONCLUSION

For the above reasons the decision of the court of appeals should be affirmed.

Respectfully submitted,

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